**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 16**

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| **ADT LLC** | § | |
| | § | |
| **Employer/Petitioner** | § | |
| | § | |
| **and** | § | **Case 16-RM-123509** |
| | § | |
| **COMMUNICATIONS WORKERS OF AMERICA, LOCAL 6215** | § | |
| | § | |
| | § | |
| **Union** | § | |

**POST-HEARING BRIEF ON BEHALF OF COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO**

Communications Workers of America, AFL-CIO (the "Union"), by and through counsel, hereby submits its post-hearing brief following upon the hearing that was conducted on January 27, 2015 in this matter.

1. This RM petition should be dismissed because the employer's basis for filing the petition is not a proper legal basis for an RM petition under controlling Board law.

We emphasize for the purpose of this discussion that if the employer's RM petition were based on actual evidence of employee non-support of the Union, such as an employee petition, or evidence of employee statements sufficient to cast good faith doubt on the Union's majority support, or evidence of a similar character, we would agree that such evidence should remain confidential and shielded by the Board's administrative-determination doctrine. However, all indications are that the employer's basis for this RM petition is not founded on evidence of such character. To the contrary, all indications are that the employer's RM petition is based solely on the assertion that when the employer consolidated the previously separate former Broadview employees

into the same facilities as the bargaining unit employees, the employees who formerly were employed by Broadview outnumbered the bargaining unit employees. See, for example, our reference to the representation made to the undersigned counsel for the Union by a Board field examiner as quoted in the Union's previous Motion to Dismiss RM Petition, which we attach hereto as Attachment A for the sake of convenience, even though the Motion to Dismiss is already part of the Board's administrative record in this case. Even more tellingly, see the comments by the employer's attorney during the hearing of January 27, 2015 in this case:

> There was an administrative investigation at the time the petition was filed. It was determined that the majority of folks as of that time were, quote/unquote, "non-union," "Broadview," whatever you want to call them folks. (TR. 55, lines 23-25 through 56, lines 1-2)

To which the Hearing Officer responded: "Okay. You're correct." (TR. 56, line 3)

Surely the administrative-determination shield cannot be and is not intended to bar legal argument and legal review about whether proper legal standards are being applied. If such were the case, and for example in this particular case, the issue of the proper application of the Board's decision in *Levitz Furniture Company*, 333 NLRB 717 (2001), were not subject to legal argument and legal review, then the rule of law will have been abandoned.

It has long been and continues to be Board law that new employees are presumed to support an incumbent union in the same ratio as the pre-existing employees. *Levitz Furniture Company*, *supra* at 728 fn. 60.

In addition the Union hereby incorporates by reference its previously filed Motion to Dismiss RM Petition, Attachment A hereto, and re-urges the arguments therein.

2. By seeking to expand the bargaining unit to employees whom it voluntarily chose to place outside the scope of the longstanding existent collective bargaining relationship, the employer is inappropriately attempting to disrupt a longstanding historical collective bargaining relationship.

Subject to our foregoing argument that the RM petition should be dismissed, the bargaining unit asserted by the employer for the purpose of this RM petition is not an appropriate unit because the employer inappropriately seeks to upset a longstanding historical collective bargaining relationship. The record establishes that the collective bargaining relationship has existed pursuant to Board certification since 1978. See the collective bargaining agreement, U. Ex. 2, Art. 1, Section 1, p. 2. This covered a time period of over 35 years at the time the employer filed this RM petition. The collective bargaining relationship never included the employees of the Broadview company. The employer acquired the Broadview company prior to 2014. On this the record fact is undisputed. In February 2014 the employer chose to close the separate facilities in which the former Broadview employees were located and to reassign the former Broadview employees into new facilities where the bargaining-unit employees were also assigned. Prior to the February 2014 consolidations, the employer's employees who previously worked for the Broadview company worked out of facilities at Irving, Texas, South Loop in Fort Worth, and Jupiter Road in Mesquite, Texas. The employees at those locations were exclusively former Broadview employees; no bargaining-unit employees worked at those locations. (TR. pp. 19, 22, 31). The employer chose to re-locate the former Broadview employees into the same facilities as bargaining-unit employees. The employer asserts no economic necessity for this decision, but instead

used self-help to self-create an asserted basis for doubting the Union's majority status, just as the same employer, or an apparent sister, affiliate, or subsidiary did in *ADT Security Services, Inc.*, 355 NLRB 1388 (2010). In *ADT Security Services, Inc.*, *supra*, the Board followed its traditional doctrine of giving significant weight to the parties' history of bargaining, stating that "our caselaw holds that 'compelling circumstances are required to overcome the significance of bargaining history.'" 355 NLRB at 1388. The Board held that *ADT Security Services, Inc.* did not meet its burden to establish the existence of the compelling circumstances needed to overcome the collective bargaining history. Ibid. Similarly here, a collective bargaining history of over 35 years has never included employees who previously worked for the separate Broadview company nor has it included any other employees whom the employer chose to place under separate compensation plans not governed by the collective bargaining agreement. See testimony of the employer's management official Jonah Serie, confirming that the new employees the company has hired since the February 2014 consolidation of facilities are not compensated under the collective bargaining agreement, but rather under a separate and different compensation plan, and indeed that the employer does not apply the collective bargaining agreement to those employees. (TR. 24, 25, 27, 28, 33, 34). While the compensation of bargaining-unit employees is based on Article 16 of the collective bargaining agreement and Schedules A and B of the collective bargaining agreement (U. Ex. 2; TR. 37, 38), the employees to whom the employer does not apply the collective bargaining agreement are paid under what the employer describes as a point system (TR. 38, 42).

Another significant difference between conditions of employment of the historical bargaining-unit employees and the employees whom the employer has chosen to place under non-bargained conditions of employment is that the bargaining-unit employees are paid daily overtime pay of time-and-one-half pay for all hours worked in excess of eight hours per day pursuant to Article 6, Section 2 of the collective bargaining agreement (TR. 44); while the former Broadview employees and the newly hired employees do not receive daily overtime pay for working over eight hours in a day (TR. 47). In addition, bargaining-unit employees receive an additional eight hours of excused time per year under Article 9, Section 4 of the collective bargaining agreement, which the former Broadview employees and the newly hired employees do not receive. (TR. 47).

When the undersigned Union counsel asked Mr. Serie what other economic provisions were received by the employees covered by the collective-bargaining agreement but are not received by the "BV" employees, the employer's attorney objected to the question and the witness did not answer it. (TR. 48). The employer has petitioned to revoke a subpoena that the Union's counsel caused to be served at the place of business of the subpoenaed individual, management official Robert Raymond. The documentation included in U. Ex. 1 demonstrates that the subpoena was delivered to Mr. Raymond's place of business at 3220 Keller Springs Road, Carrollton, Texas, which the employer's witness Serie acknowledged to be the address of Mr. Raymond's office (TR 60). Request #9 of the subpoena asked for production of records showing all wages, hours, and conditions of employment currently applied to all service or install technicians to whom ADT does not currently apply all the terms of the current or most

recent collective bargaining agreement with the Union and who are stationed at or report to the locations to which the bargaining-unit employees report in Carrollton, Haltom City, Trinity, and Tyler. See U. Ex. 1, Attachment A. Since the employer has chosen to place the employees who have been hired since February 2014 outside the bargaining unit, refusing even to let the Union know the names of such employees (TR. 64-65), and even went so far as to have its attorney in this hearing plead ignorance when his own witness asked for a copy of the non-unit pay schedule (TR. 38, lines 20-24), the Union has been denied access to complete information about the contrasting different conditions of employment. Nevertheless, the differences that the employer's witness did identify, as described above, are no less significant than the differences that the Board deemed significant in *ADT Security Services, Inc.*, *supra*, at 1388, in the context of an employer's attempt to disrupt a historical bargaining unit—such as different rates of pay and separate on-call lists which remained intact following the consolidation of employees. Id.

The employer seems to claim that the pendency of the RM petition somehow compelled it to place the employees newly hired after February 2014, who never were employed by the Broadview company, outside the bargaining unit. Such a claim or implication is insupportable under Board law. In its definitive decision in *Levitz Furniture Company*, the Board makes it clear that an employer who files an RM petition should continue to recognize the union while pending the RM proceedings. *Levitz Furniture Company*, *supra*, at 724, 726, 727. In this case the employer consciously and voluntarily chose to place the former Broadview and subsequently hired new employees outside the scope of the collective bargaining agreement. The historically longstanding

bargaining unit of over 35 years' existence never included employees who were paid under different compensation plans and who were treated differently in overtime pay than the corresponding provisions of the collective bargaining agreement. Or at least, if the historical collective bargaining relationship ever was applied to employees who had non-bargained pay and overtime systems, it was the employer's burden to establish such a fact, and it made no attempt to do so.

Accordingly, the employer's attempt to disrupt a historical longstanding collective bargaining unit through this RM petition should be rejected, and the Board should hold that the petitioned-for unit is inappropriate and, if an election is ordered pursuant to this RM petition, the employees to whom the employer has chosen consciously and voluntarily not to apply the collectively bargained conditions of employment should be excluded from the unit for the purposes of this RM petition.

3. The employer is equitably estopped from seeking to include in the voting unit those employees to whom it has chosen not to apply the collectively bargained conditions of employment.

The Board applies the doctrine of equitable estoppel. *Red Coats, Inc.*, 328 NLRB 205 (1999). By its voluntary decision to place all employees newly hired since February 2014 outside the scope of the collective bargaining agreement, while at the same time asserting in this case that those employees should be included in the bargaining unit for an employer-generated election calculated to place the Union's historical recognition at risk, the employer has intentionally taken inconsistent actions to the Union's detriment by withholding from the newly hired employees the benefits of the collective bargaining agreement. Under the doctrine of equitable estoppel, the employer should be estopped from this self-serving manipulation of Board processes. *Red Coats,*

*Inc., supra*. Accordingly, the newly hired employees with respect to whom the employer has freely and voluntarily chosen to deny the benefits of the collective bargaining agreement should be excluded from the voting unit for the purposes of this RM proceeding.

4. In the alternative, this RM proceeding should be blocked pending the investigation and outcome of the unfair labor practice charges filed by the Union in case number 16-CA-144548.

Subject to and in the alternative to the Union's above and foregoing arguments: In case number 16-CA-144548, as to which the Union requests the Board to take administrative notice, the Union contends that the employer's, which is now undisputed based on the hearing record in this proceeding, failure and refusal to apply the terms of the collective bargaining agreement to new employees hired within the period of six months prior to the filing of the charge constitutes a withdrawal of recognition of the Union with respect to those employees. It is axiomatic that an employer's unilateral placement outside the bargaining unit of employees who fall within the scope of the recognized bargaining unit constitutes an unlawful withdrawal of recognition with respect to those employees in violation of Section 8(a)(5) of the Act. See for example *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995). As we have discussed above, the pendency of the RM petition did not provide a legitimate excuse for the employer to place these employees outside the bargaining unit. Article 27 of the collective bargaining agreement establishes that the agreement automatically renewed from May 28, 2014 to May 28, 2015 unless either party gave notice in writing of its termination or of any changes desired 60 days prior to May 28, 2014. (U. Ex. 2, p.18). Competent testimony has been scheduled to be presented to the Board's Field

Examiner in the very near future on behalf of the Union in the pending ULP case. Such testimony will establish that the collective bargaining agreement was automatically renewed under the terms of Article 27 and is currently in effect through May 28, 2015. The pending unfair labor practice charges clearly present serious issues. If the charges result in a finding of merit, such violations would clearly taint any election due to the unlawful withholding of the benefits of the collective bargaining agreement from a material number of employees. See for example, testimony in this case that a sizeable influx of new employees came into the Carrollton office from September to October 2014. (TR. 65). *Levitz Furniture Company*, *supra* at 728 note 57, establishes that the blocking-charge doctrine rule remains an important part of Board policies in RM petitions. As the Board stated, "It is immaterial that elections may be delayed or prevented by blocking charges, because when charges have merit, elections *should* be prevented." Ibid.

We cannot fail to note that during the hearing in this case the employer's attorney repeatedly asserted that the Union was responsible for delays in processing this RM case. The truth is utterly to the contrary. Any delays incurred heretofore in the processing of this case were caused solely by the employer's unfair labor practices, or at least unfair labor practices that the Regional Director found to be sufficiently established to issue a complaint and proceed to a merit-based settlement. We are referring of course to case number 16-CA-124152, and we request that administrative notice be taken of the Board's files and records in that case. Furthermore, the legitimately alleged violations in case number 16-CA-144548 occurred during the very settlement posting period of case number 16-CA-124152, lending even more reason to

applying the blocking rule and suspending the further processing of this RM case pending the investigation and outcome of the pending unfair labor practice charges.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify service of the above and foregoing Motion to Dismiss RM Petition by email to the below indicated counsel of record for the Employer on the 3rd day of February 2015.

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